

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 Irene A. Rogers,

Case No. 13-cv-1698 (SRN/TNL)

5 Plaintiff,

6 vs.

7 Bank of America, N.A.,
8 et al.,

Defendants.

St. Paul, Minnesota
Courtroom 7B
April 10, 2014
2:00 p.m.

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10 BEFORE THE HONORABLE SUSAN RICHARD NELSON

11 UNITED STATES DISTRICT COURT JUDGE

12
13 HEARING ON DEFENDANTS' MOTION TO DISMISS [DOC. NO. 9]
14

15 APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

(Commencing at 2:06 p.m.)

THE COURT: We are here this afternoon in the matter of Irene Rogers versus Bank of America, et al. This is civil file number 13-1698. Let's begin by having Counsel note your appearances, please.

MR. KEOGH: Michael Keogh, K-e-o-g-h, on behalf of Plaintiff, Irene Rogers.

MR. SCHROEDER: Good afternoon, Your Honor. Mark Schroeder from Briggs & Morgan. I'm here on behalf of the Defendants, Bank of America, NA; New York Bank Mellon; and Mortgage Electronic Registration Systems, Inc.

THE COURT: Very good. And we are here today to consider your motion to dismiss, Mr. Schroeder.

MR. SCHROEDER: Thanks, Judge. Yes, we are here on the Defendant's Rule 12(b)(6) motion to dismiss. I will try to keep my remarks fairly brief because I think the issues and the law are presented fairly well in the briefs that were previously filed with the Court. Two primary contentions, as I understand the Complaint from Mrs. Rogers, are before you, and I'd like to spend some time on both of the issues.

One is whether or not the mortgage foreclosure sale should be voided for a couple of reasons as raised by the Plaintiff. And the second primary contention is whether there

1 was a breach of contract premised upon an alleged failure to
2 modify a mortgage loan. We believe that the complaint fails
3 to state a claim for relief under either one of these
4 contentions, and I'd like to get into both of those
5 contentions specifically and try to explain why we think no
6 claim is stated in this Complaint. Before I do so -- I don't
7 want to get bogged down in the allegations, but just to tick
8 off a quick chronology as to sort of what happened here.

9 We've got a mortgage loan represented by a Note and
10 mortgage that was originated in 2003. Mr. Rogers was the only
11 party on the note, whereas the mortgage was signed by both
12 Mr. and Mrs. Rogers, with the MERS, Mortgage Electronic
13 Registration Systems, as the legal mortgagee of record. In
14 the 2007 to 2009 timeframe, the mortgage loan goes into
15 default. Unfortunately, it appears it's due to health --
16 serious health issues for Mr. Rogers, who ultimately passed
17 away. During the time of those issues, there was an
18 Assignment of the mortgage instrument from MERS to Bank of New
19 York Mellon that was dated June 10th of 2008.

20 That Assignment, which we contended is the operative
21 Assignment of Mortgage as attached to the Anderson Affidavit
22 at Exhibit C that we filed with our motion papers, there were
23 attempts during the same timeframe and then going into the
24 time that a Notice of Foreclosure Sale was served that there
25 were various efforts and discussions about a potential loan

1 modification by Mrs. Rogers with Bank of America, who operated
2 as a servicer of this mortgage loan, but those attempts were
3 unsuccessful.

4 Ultimately, a Notice of Foreclosure Sale was served
5 on February 20 of 2012 with a foreclosure sale that was
6 consummated in May of 2013. And documents reflecting the
7 foreclosure sale notice and the Sheriff's Certificate of Sale
8 are attached as Exhibit E to Mr. Anderson's Affidavit. With
9 that background, then, I'd like to get into the two primary
10 contentions.

11 First -- and I think this will be the bulk of my
12 comments this afternoon -- is whether or not the Complaint
13 properly provides a basis to either void the foreclosure sale
14 or somehow void the Assignment of Mortgage from MERS to Bank
15 of New York Mellon. In Counts 1 and 2 of the Complaint, the
16 Plaintiff seeks declaratory relief with respect to those
17 matters. In the first instance, let's talk about whether or
18 not the Assignments of Mortgage are invalid. And I understand
19 that Plaintiff makes two contentions -- well, they -- the
20 primary contention is that somehow the Assignment of Mortgage
21 was improper because it was done after the time that a
22 securitized pool of loans had closed, and therefore
23 purportedly violated the terms of a Pooling and Servicing
24 Agreement that reflected the securitization and was thus void
25 under New York trust law.

1 We've presented two reasons why we think that the
2 New York trust law argument fails and that there's no basis to
3 invalidate the 2008 Assignment of Mortgage. First, the
4 Plaintiff, who was not a party to the Pooling and Servicing
5 Agreement, has no standing to challenge what the parties did
6 or didn't do with respect to that Agreement. The law is very
7 clear on that issue, probably the most specific pronouncement
8 of that is the *Karnatcheva* case of the Eighth Circuit. I know
9 that this -- the District of Minnesota and you, Judge Nelson,
10 specifically have dealt with whether or not mortgagors have
11 any right to assert -- or any standing to assert claims for
12 purported violations of Pooling and Servicing Agreements.

13 And I think the answer has been uniform in the
14 District, and that is that the Plaintiff does not have
15 standing. I would note two of your cases -- and I don't
16 recall whether we had cited these in our brief or not -- but
17 the *Nelson versus Bank of America* case and a *Peterson versus*
18 *Citimortgage* case. Both were before you on motions to
19 dismiss, and you concluded in those cases that a
20 Plaintiff/borrower did not have standing to assert claims that
21 someone violated a Pooling and Servicing Agreement.

22 The second and potentially more novel argument is
23 whether or not there's some sort of violation of New York
24 trust law that would invalidate the Assignment of Mortgage
25 that postdated the closing of the acquisition of mortgage

1 loans by the trust. Mr. Keogh in his brief cites a couple of
2 cases, one out of New York, *Erobobo* -- and I'll get you a
3 spelling on that, Heather, at an appropriate point -- and
4 another case, *Glaski* out of California, that discussed New
5 York trust law. We addressed those cases in our reply brief,
6 and it's clear that both of those cases cited by the Plaintiff
7 are outliers and that the vast majority of Federal Courts to
8 look at the analysis in those cases has rejected the premise
9 that somehow mortgage instruments that are signed after the
10 closing of a securitized trust are somehow void.

11 The courts, rather, have said, at best, the
12 instrument may be voidable, but the law is that New York trust
13 law does not provide a basis to void those foreclosures. Of
14 more interest and actually a couple of cases have come down in
15 this District that post-date our briefing on this motion to
16 dismiss that have square-on dealt with this same New York
17 trust law issue. And I'd like to just identify them for the
18 Court and I've got extra copies, if you'd like to see them --

19 THE COURT: That would be great. That would be
20 great.

21 MR. SCHROEDER: If I may approach, Your Honor.

22 THE COURT: You may.

23 **(The Court is handed a document.)**

24 MR. SCHROEDER: Your Honor, I've just handed the
25 Court and Plaintiff's counsel two recent cases in this

1 District that have addressed the New York trust law issue and
2 have both have concluded that the same kinds of arguments do
3 not provide a basis to invalidate Assignments of Mortgage
4 instruments after the closing date of a mortgage. The first
5 one is the *Wolff* case. It said an order from Judge Schiltz in
6 February of 2014 reported at 2014 Westlaw 641510. Judge
7 Schiltz does a couple things in his order. First, he finds
8 that the mortgagor borrower doesn't have standing to raise the
9 argument. But then he makes the observation at *1 of the case
10 that as to mortgages originally held by MERS, which would be
11 the situation here, the PSA requires only that a copy of the
12 mortgage be delivered to the Trustee by a particular date. It
13 does not require that those mortgages be assigned to the
14 Trustee by a particular date.

15 We think that that analysis is dispositive here.
16 More telling is Magistrate Judge Mayeron in her Report and
17 Recommendation in *Wolff*, which is appended to the *Wolff*
18 decision that I just handed to the Court, she looked
19 specifically at the New York cases, the same cases that are
20 cited by Mr. Keogh. And she looked at this issue of void
21 versus voidable and concludes, much like the cases we cite in
22 our reply brief, that at best the Assignment of Mortgage would
23 be voidable under New York law. She provides authority for
24 that proposition, and I'm sorry -- that's at *9 of the Westlaw
25 opinion where she gets into that discussion.

1 We think *Wolff* is on all fours in much the same way
2 the other case that I handed to the Court and to counsel this
3 afternoon, *Twigg versus U.S. Bank* reported at 2014 Westlaw
4 755230, is also a report -- well, it's an order from Judge
5 Montgomery again rejecting this similar sort of an argument at
6 *3 of the decision. We think the district has weighed in on
7 this issue. It has rejected it, it's consistent with the
8 decisions in other districts, and we think that this argument
9 fails as a matter of law. And thus, the Assignment of
10 Mortgage from MERS to Bank of New York in 2008 is not
11 invalidated because of New York trust law.

12 The other basis on which Plaintiff attempts to seek
13 to void the foreclosure sale is, as I understand it, to say
14 that there was a second Assignment of Mortgage that was not
15 listed in the Notice of Foreclosure Sale and therefore there
16 was some violation of the Minnesota statutes regarding the
17 statute concerning foreclosure by advertisement. This
18 argument, too, fails for a couple reasons. The primary reason
19 is that this second purported Assignment of Mortgage is a
20 nullity as a matter of fact and a matter of law.

21 And what I'm talking about, Judge, just so it's
22 clear, there was an Assignment of Mortgage again from MERS to
23 Bank of New York Mellon that was approximately, I guess, three
24 years after the Assignment that we were talking about earlier.
25 It was dated October 7th of 2011. It's appended to the

1 Complaint as Exhibit G. But that second purported Assignment
2 doesn't assign anything because it's the same instrument, just
3 with a different date. It attempts to assign MERS' rights in
4 the mortgage to the same assignee, The Bank of New York
5 Mellon. But in 2011, MERS didn't have anything to assign
6 because it had already assigned its rights to bank of New York
7 Mellon.

8 So, basically it's a nullity. It doesn't assign
9 anything whatsoever, and a similar situation came up in a case
10 that wound its way up to the Minnesota Court of Appeals that
11 we cite in our reply brief. It's the *Oppong* case. It's in
12 our Reply at Page 9, note three -- footnote three. And in
13 that case, there was a similar situation where there was a
14 second purported Assignment of a Mortgage instrument between
15 the same assignor and the same assignee. And the Court in the
16 *Oppong* case, the appellate court, had no problem finding that
17 that second Assignment essentially was null and did not impact
18 the validity of the foreclosure sale.

19 We think that that line of cases recognized by
20 *Oppong* supports finding that this second purported Assignment
21 doesn't invalidate anything. And what's crucial here is
22 there's never a break in the chain of title. The chain of
23 title, which is the reason that Assignments of Mortgage are
24 supposed to be recorded under Chapter 580, the foreclosure by
25 advertisement statute, was clear. It went from the original

1 mortgagee, MERS, to the Bank of New York Mellon which was the
2 entity that foreclosed on the Rogers mortgage. So, we think
3 that there's a clean chain, and there's no basis to invalidate
4 the foreclosure sale.

5 And despite this second purported mortgage, I think
6 it's clear that there was complete and full compliance with
7 the requirements of Chapter 580, both section .02 and .04
8 insofar as the foreclosure. Well, first, the operative
9 Assignment of Mortgage was recorded, which is what's required
10 by 580.02, and then the mortgagee and the assignee were both
11 identified in a Notice of Foreclosure Sale, which is what's
12 required under chapter 580.04. Given full compliance with
13 Chapter 580, the foreclosure sale is valid and should not be
14 voided.

15 We think there's no basis for declaratory relief as
16 sought in Counts 1 and 2, and those counts should be
17 dismissed. Final point on this Assignment issue and whether
18 or not the sale could be voided, there is three more claims
19 that are -- I'll kind of describe as the statutory claim and
20 the common law defamation claim. Count 4 is for defamation,
21 Count 5 is a Minnesota Chapter 58 claim, and Count 6 is a
22 Minnesota Statute Section 8.31 claim. All three of those
23 claims are really premised upon there being an improper or
24 invalid Assignment or an improper or void foreclosure sale.
25 And based on what I've just discussed with respect to the

1 declaratory judgment counts, if there's not an invalid
2 Assignment or an invalid mortgage, there's no basis to proceed
3 on either the statutory or defamation claims. We think those
4 counts should also be dismissed.

5 That takes me to what I think is sort of the final
6 contention. That's the last count of the Complaint. This is
7 the breach of contract claim, Count 3 of the Complaint. And
8 this is the contention that relates to whether or not there
9 was a breach of contract by a failure to modify the loan. We
10 think that that count also fails to state a claim for two
11 reasons. First, there is no enforceable agreement that
12 complies with the Minnesota Credit Agreement statute, which is
13 Minnesota Statute 513.33. And as because there is no written
14 Loan Modification Agreement between the parties that was
15 executed by all the parties, and that's -- those are the
16 explicit requirements under that statute.

17 We have cited numerous cases, many of which are in
18 this Court, in which breach of contract claims in the context
19 of purported loan modifications have been dismissed for
20 failure to comply with the credit agreement statute. We think
21 that those cases control here, and the operative part of the
22 Complaint that would warrant dismissal is paragraph 69 where I
23 think there essentially is an admission with the allegation
24 that there was no Loan Modification Agreement executed by Bank
25 of America, the servicer.

1 The second reason that Count 3, the breach of
2 contract claim, should be dismissed besides the failure to
3 comply with the credit agreement statute is there never was a
4 Loan Modification Agreement at all. In fact, as alleged in
5 the Complaint, in at least three cases -- paragraphs 35, 42,
6 and 43 -- the servicer declined to modify the loan and so
7 advised Mrs. Rogers because she was not a party to the Note.
8 So, there was no agreement between these parties to modify the
9 existing mortgage loan. So, we think there's no basis to
10 proceed, nor is there a claim stated on Count 3.

11 And with that, I would ask the Court to do two
12 things: First, to grant the motion to dismiss, and second to
13 dismiss all claims with prejudice and on the merits.

14 THE COURT: Thank you very much.

15 MR. SCHROEDER: Thank you.

16 THE COURT: Mr. Keogh.

17 MR. KEOGH: Before I start my argument, I'd like to
18 clarify, if I could, who, if anybody, represents Bank of New
19 York Mellon Trust Company. They're a party to this lawsuit,
20 and you didn't mention that you represented them or who does.

21 MR. SCHROEDER: Yeah, well, I do. And I guess I
22 used a shorthand. I think we entered our motion papers on
23 behalf of New York Bank as the Trustee of the securitized
24 entity and --

25 MR. KEOGH: No, but there's two co-trustees, so you

1 represent both of them?

2 MR. SCHROEDER: Um, I think I do.

3 MR. KEOGH: Okay. I was just -- don't know.

4 MR. SCHROEDER: Your Honor, may I just clarify I
5 represent the Defendants that are named in the action.

6 THE COURT: I get it. Yep. Okay.

7 MR. KEOGH: Well, there's basically two -- the
8 claims pled fall into two groups. The one is for not
9 following the Minnesota foreclosure statute and Minnesota law,
10 and the other one surrounds the Assignments of record not
11 being valid under the New York trust laws.

12 But before I get into that, because especially the
13 part about the trust laws is a complex argument that many
14 people have unsuccessfully tried to make in this District, I'd
15 like to talk about what we do know. And what we do know, what
16 the other side does not dispute is Irene Rogers has been an
17 owner on title to that house since 2003. The mortgage that is
18 in dispute now was not originated in 2003; it was originated
19 in 2005. It was not to buy the house, it was to re-fi the
20 house. And it was at that time Countrywide, which of course
21 Bank of America, successor by merger, to -- re-fi'd two prior
22 loans of their own. We're here today, in a way, because of a
23 broker who is an independent but worked for Countrywide named
24 Daniel Kana (ph). And when he filled out the credit
25 application, he put Mr. Rogers on it, but he didn't put

1 Mrs. Rogers on it. And so she ended up signing the mortgage
2 lien, which created the power to foreclose potentially on the
3 originator and any assignees.

4 But it's the reason -- it's the reason why even
5 though she performed and she was ready for a HAMP loan
6 modification -- and there was another now-defunct federal
7 program that would give her up to \$50,000, which was less than
8 the amount due -- and the reason Bank of America turned down
9 both modification things that it extended was because,
10 although they could foreclose on her, although she was the
11 owner -- at that time she was the only owner of the thing and
12 she was the sole (inaudible), and they had knowledge because
13 they got a copy of the letter testamentary -- she was the
14 only -- she was the only -- the personal representative of the
15 estate, they wouldn't deal with her.

16 THE COURT: And that may feel inequitable, but
17 there's no cause of action for that, is there, against these
18 Defendants.

19 MR. KEOGH: My understanding, just to answer this
20 question, is that in this circumstance when the debt, the
21 Note, was only in the name of the decedent, it went to the
22 estate. After she told them her husband had died, when it
23 came around to do it, she was that -- she gave them
24 documentation that not only did she have authority to deal
25 with it, she was the only person with authority to deal with

1 it --

2 THE COURT: I hear what you're saying. It doesn't
3 create a cause of action, does it, sir? Lots of inequities in
4 this world that we can't address in Federal Court, right?

5 MR. KEOGH: I understand. I will say -- I will say
6 and I will ask for an opportunity to supplement that Bank of
7 America turning her down because she is not on a Note, there
8 has been litigation over an FHA rule that did it and now is an
9 exempt transaction that you cannot turn somebody down for a
10 HAMP loan modification on.

11 THE COURT: But that's subsequent.

12 MR. KEOGH: I don't know when the rule got changed,
13 but I would certainly offer to supplement with the effective
14 date.

15 They also don't dispute that New York trust law
16 controls the Pooling and Service Agreement, aside from the
17 standing issue. And as far as the Assignments of Mortgage,
18 I'm a bit confused because in their original motion, they
19 say -- they argue that the second one controls; the first one
20 doesn't matter. And now in their reply brief and now the
21 argument I just heard, they said the second one -- if the
22 first one controls, the second one is a nullity.

23 THE COURT: I read them to always say the first one
24 controls. Am I wrong, Mr. Schroeder, about that?

25 MR. SCHROEDER: I re-read the briefs. That

1 certainly was the position that I thought we were
2 articulating, and certainly it's what I've tried to present
3 today.

4 THE COURT: Okay.

5 MR. KEOGH: I'll start with the easier part, the one
6 that sounds on Minnesota law about that. Their argument is
7 rather tortured. They bring up *Jackson*. And one of the
8 things that *Jackson* says on MERS loans, which this is
9 admittedly one, you don't have to record an Assignment at all.
10 *Jackson* also says -- *Jackson* also -- *Jackson* also says that
11 MERS doesn't do anything. MERS doesn't assign, MERS doesn't
12 do it, they just act as a nominee for whoever originates the
13 loan. If that's true and they didn't record, I don't know why
14 they recorded two assignments who weren't signed by anybody,
15 anybody who actually loaned money to anyone. They were signed
16 by two different -- two different employees or designees of
17 MERS.

18 THE COURT: But they did assign, and so all of this
19 is moot, isn't it? Again, a frustration, but there is an
20 Assignment and a clear chain of title, is there not?

21 MR. KEOGH: Well, there is one thing is -- that's
22 the other thing. The other thing is before we get into the
23 New York trust law parts of this and the validity of the
24 Assignments are not under that, why did they assign twice when
25 Minnesota law says they don't have to do it at all?

1 THE COURT: Well, who knows, but we don't care. We
2 don't care, do we? I mean, why do we care? Do you care? I
3 mean --

4 MR. KEOGH: I do care because basically *Jackson* --
5 and MERS says also MERS has nothing to assign. And the only
6 Assignments of Mortgage, there is no Assignment whatsoever
7 from the original creditor to The Bank of New York Trust, even
8 if they were legally able to take the mortgage at the time
9 that it was purportedly assigned. That's why I -- that's why
10 they -- we care, or at least that's why I care.

11 Now, before I get into New York trust law, I will
12 just note that every single Minnesota District case was either
13 brought by a pro se litigant or the local attorney that we
14 diplomatically refer to as "the attorney that was sanctioned,"
15 who started getting sanctioned about two years ago; who, if I
16 recall correctly, the Eighth Circuit said, Quit appealing
17 these cases or we'll sanction you, too. The two cases that I
18 hadn't seen before they brought, one was brought by that
19 attorney, and the other one was brought by another lawyer in
20 his office.

21 So, this is a very complicated issue as far as
22 securitization failure. It would be an exceptional pro se
23 litigant who could plead it so it could pass muster under
24 *Iqbal* and *Twombly*, and the counselor I'm diplomatically and
25 euphemistically referring to obviously proved multiple times

1 he could not. As far as --

2 THE COURT: Explain to me why Judge Schiltz is
3 wrong. Judge Schiltz is often not wrong, so explain to me why
4 Judge Schiltz is wrong in concluding that your client would
5 have no standing.

6 MR. KEOGH: Well, which case in particular are you
7 referring to, Your Honor? The new one?

8 THE COURT: Referring to the new one, the *Wolff*
9 case. It looks to me that Judge Schiltz finds no standing,
10 and he says, as to mortgages originally held by MERS, the PSA
11 requires only that a copy of the mortgage be delivered to the
12 Trustee by a particular date. It does not require that those
13 mortgages be assigned to the Trustee by a particular date. It
14 looks like those are the two basis of his opinion. And he
15 cites to *Karnatcheva*, the Eighth Circuit decision, with
16 respect to standing.

17 MR. KEOGH: Which is, of course, another Butler
18 case.

19 THE COURT: Yes, but presumably the Eighth Circuit
20 can sort this through here.

21 MR. KEOGH: Yes, but even the Eighth Circuit would
22 not need to do much to affirm if the case wasn't pled properly
23 from the beginning.

24 THE COURT: Well, I am bound by the Eighth Circuit's
25 decision in *Karnatcheva*, wouldn't you agree?

1 MR. KEOGH: And I understand, so I will say what
2 this is. The first person to opine on this -- and it's on
3 Page 9 of my brief -- is that is the *Greene* case. And
4 basically Judge Frank said two things in that. And he said,
5 one, this is improperly pled, which I took as a shorthand it
6 doesn't pass under *Iqbal* and *Twombly*. And the second thing is
7 he says they don't have standing, but there's absolutely no
8 legal analysis or one case cited for why they have standing --

9 THE COURT: Okay. You tell me why your client has
10 standing.

11 MR. KEOGH: I have standing because this is not a
12 normal trust. This is not a testamentary trust that's set
13 up -- set up for estates in trusts purposes. This isn't a
14 trust that is set up for business purposes or asset protection
15 purposes. This is public. This is public because it is a
16 security that is sold and registered with the Securities and
17 Exchange Commission. And the reason they make these
18 securitized trusts are for two primary reasons from the
19 business end to put this together.

20 One is they want to put together this investment and
21 securitize it and sell it to investors, of course. They do
22 that, but there are many companies, usually at least six,
23 involved in these. And they set it up in a trust so it's what
24 they call, a term of art, "bankruptcy remote." So if anything
25 happens where one of the people in there goes into -- one of

1 them goes into bankruptcy, that the other people in the trust
2 don't (multiple inaudible words), or at least the lost is
3 limited to the trust.

4 Other possibly compelling things are these trusts
5 are afforded a special tax treatment by the IRS, which is
6 where you get the 90-day cutoff; the IRS Code is cited, I
7 believe it's 860D. The trusts we're talking about right now
8 is composed of, I believe, three or four real estate
9 investment corporations. And the significance of that is is
10 if they go ahead and everything is done properly with the
11 trust, the investors who buy the certificates that comprise
12 the trust, the interest that they get by virtue of their
13 ownership comes to them tax free.

14 THE COURT: But what creates standing for your
15 client?

16 MR. KEOGH: What creates standing for my -- for my
17 client is that this is -- this is public. There is New York
18 law -- they say it's voidable; they cite a number of -- they
19 cite a number of cases for this position, a couple from
20 District Courts, but they do not state one New York state case
21 that says that that's voidable. The plain language of the
22 statute, which I cite in my materials, says if the Trustee
23 acts in contravention, it is void.

24 THE COURT: That may be the case. Why does your
25 client have standing? I still don't understand the connection

1 between your client and this troubling trust.

2 MR. KEOGH: Because the trust tells the IRS and the
3 Securities and Exchange in exchange for special treatment and
4 access to capital that it's going to do things according to
5 this. The New York law -- and these are almost uniformly done
6 under New York or Delaware law because the trust laws in that
7 state say that acts in contradiction in written trusts by the
8 Trustee are not "voidable" like they are in the other 48
9 states but "void," otherwise the IRS would not approve the tax
10 treatment.

11 If the acts -- if the -- if there's at least a *prima*
12 *facie* case that it's acting outside the trust, like in this
13 case where the Trustee was supposed to do the Assignment
14 within 90 days of it and didn't do it until literally years
15 later, the Trustee has no legal authority behind it. He
16 doesn't have the authority behind it, and they're depriving
17 the client of not just property, but her homestead property,
18 which is protected by, among other things, the Minnesota
19 Constitution, the Minnesota property laws.

20 This is a title case. The other case -- all you can
21 really derive from the cases cited against standing in this is
22 that they weren't properly pled. If there was one where it
23 was actually analyzed on the merits beyond *Iqbal* and *Twombly*,
24 I'm not aware of it. And *Greene* seemed to be the first one in
25 our district to analyze it. I can understand the argument if

1 it was a normal trust, but this is not a normal trust. This
2 is a publicly-offered security, and the Trustee is
3 circumscribed by the Trust Agreement under New York law.

4 Also, I'm not aware in any of those other cases they
5 asked for a Declaration under New York law because
6 everybody -- because every case of them I read -- and I
7 believe I read all of them -- was under Minnesota law.
8 Minnesota law has nothing to do with the action of the trust,
9 and in this case the Defendants do not dispute that New York
10 law controls. Ultimately, although this is declaratory
11 judgment and everything else, this is a title case. The only
12 person alive who had title to this property since 2003 is
13 Irene Rogers. The co-trustees -- the co-trustees acted in
14 contravention of their trust agreement. They acted in
15 contravention of the states code -- pardon me, the IRS Code,
16 that gives them the favorable tax treatment on this.

17 MERS, whatever it -- despite the Minnesota Supreme
18 Court's guidance that they don't do anything, were the only
19 ones that assigned, and they assigned when apparently
20 Minnesota law says they didn't have to do anything. So if
21 they didn't have to do anything and it wasn't necessary, why
22 did they do it? And it still -- and I dispute the fact there
23 is an unbroken chain of title because there's no Assignment
24 whatsoever from the original creditor, which was Countrywide,
25 to this trust. MERS didn't -- MERS -- MERS did not lend my

1 client any money because MERS doesn't do that. The trust
2 didn't own -- the trust didn't loan my client any money.

3 And I've got here -- because it's a standard form --
4 this is a Uniform Conveyancing for Mortgage Satisfaction by
5 Assignee. The form number is 20.5.5. It's the form that's
6 filled out and recorded when somebody pays off a mortgage loan
7 in Minnesota. But the problem is with the state of the title
8 on this, if my client had every penny -- and we don't dispute
9 she's in default. We do dispute that the title would -- the
10 title to her property -- the foreclosure sale is void, the
11 Assignments were not recorded to legal satisfaction, and
12 consequently asking for declaration that she remains in title
13 of the mortgage.

14 Who would sign this? Countrywide says they -- Bank
15 of America says they have nothing to do with it. There are
16 two co-trustees. There are two co-trustees: Bank of New York
17 Mellon and Bank of New York Mellon Trust. Bank of New York
18 Mellon Trust is, although they're a Trustee, co-trustee,
19 they're the only one who hasn't put their name on something
20 related to this. And the thing is, is without an opportunity
21 for discovery, we don't know because when they put it into
22 this trust, they put it into a private world. If you look and
23 you can see this on -- in Exhibit 3, Sections 2.01, the
24 internal pagination on Page 61. But as far as the exhibit
25 goes -- it's Page 78 -- there is this incredibly intricate way

1 on how you get mortgage trust, which this mortgage would
2 ostensibly have to get into somehow, and there's no way of
3 confirming it because it's private.

4 Also, I know you're familiar -- because the name
5 escapes me -- because I know you've decided at least a couple
6 of cases after the Minnesota Supreme Court decided *Ruiz* last
7 April.

8 THE COURT: Yes.

9 MR. KEOGH: Nobody knows. It's a gray area. There
10 is no authority whatsoever how *Jackson v. MERS* and *Ruiz*
11 interacts, whether *Ruiz* changes or modifies or is completely
12 separate. And until somebody brings a case with those kinds
13 of facts through the -- either through the Court of Appeals or
14 a case that's brought in this District is certified to the
15 Minnesota Supreme Court, we really don't know. No one really
16 knows.

17 Lastly, I'll just speak very briefly about the
18 contract claim, and then I'll conclude my arguments unless the
19 Court has any questions.

20 THE COURT: Thank you.

21 MR. KEOGH: Modification of any contract, especially
22 one governed by the statute of frauds, as mortgages are on
23 multiple basis, are voluntary. We concede that. Unless both
24 parties agreed in writing, it's not enforceable. But when my
25 client was in default, they didn't -- they made an offer which

1 she fully performed under, and then they unilaterally and
2 arbitrarily did it because they thought she wasn't a party to
3 the debt.

4 But they had actual knowledge not once but twice
5 that by virtue of being the personal representative of her
6 husband's estate, she had authority to deal with the debt.
7 After they found out her husband is dead, they actually
8 changed the bills to "Estate of John Rogers," but they refused
9 to deal with the personal representative of the estate.

10 THE COURT: And unfortunately the law says we can't
11 do anything about that, as unfair as that might seem. Am I
12 right?

13 MR. KEOGH: I would say that she performed fully,
14 and they had -- and they were -- there was a duty to deal with
15 her because she was the sole living person left who had
16 ability to deal with that debt. And the Bank of America has
17 no authority whatsoever not to deal with her just because its
18 employee in 2005 didn't put her on the Note but put her on the
19 mortgage and put her on everything else. And he didn't put
20 her on the note for the reason every mortgage broker doesn't
21 put somebody who is on the property on the Note. It's so they
22 can get it through underwriting quicker and get their things
23 and get their commission.

24 If it were another broker, it would be an entirely
25 different fact pattern, but Bank of America created this. But

1 when their employee didn't put her in the credit application
2 like they should have, Bank of America -- Irene Rogers had
3 nothing to do with this being purportedly sold to a
4 securitized mortgage trust. Obviously, she's a borrower, so
5 she has no -- she has nothing -- she has nothing to do with
6 complying with the state foreclosure statute. And so -- and
7 she did -- she was diligent in every way, shape, or form in
8 relation to the offers that Bank of America has, but yet they
9 have no accountability for any of it.

10 Before I ask -- before I ask the Court for what I
11 would like with respect to this motion, I will just say that
12 if you say that no plausible claim exists here, you're
13 abrogating the estate laws in Minnesota, you are abrogating
14 the foreclosure statute which, quite frankly, is not all that
15 hard to comply with. As a matter of fact, if you read their
16 briefs, they admit the primary problem from the foreclosure
17 perspective were there were two Assignments and all the
18 Assignments had to be on the Notice of Foreclosure Sale. They
19 didn't put the first one on there. They admit it.

20 And under *Jackson*, under *Moore*, you don't strictly
21 comply with the statute, aside from a couple of cases that
22 have. And this isn't on point with those. It's void. And
23 basically, also what you're saying is that a homeowner
24 where -- basically a homeowner who has the misfortune of
25 having this assigned to some kind of securitized mortgage

1 trust, whether they follow the securities and tax laws doing
2 that and follow their own thing and act in contravention of
3 New York state law -- which by the way they couldn't come up
4 with a New York state law that -- a New York state case that
5 says it's voidable, not void -- or a case that wasn't either
6 pro se or from -- I'll be diplomatic here and say a "tainted
7 pool of decisions," there is nothing you can do.

8 Apparently, all they have to do is file -- file --
9 file an Assignment at some point that does -- that is -- that
10 doesn't form an unbroken chain of title, and invest in your
11 property through a non-judicial statutory procedure. And
12 lastly, because -- because -- because it's an unsettled issue
13 and neither the Supreme Court or anybody else has opined on it
14 yet, by -- by -- by -- if this motion is granted, you arguably
15 abrogate *Ruiz*.

16 THE COURT: Well, I'm sure the Eighth Circuit will
17 straighten me out, huh.

18 MR. KEOGH: Well, if that's the -- if that's the
19 case, that would be -- that would be the case. But I believe
20 it's distinguishable because I don't believe any of the cases
21 that they cited ever asked for Declaration under the New York
22 law. They all ask for Declaration under Minnesota law which
23 does not control here. And I am not sure whether all those
24 other Pooling and Service Agreements in all those other cases,
25 but I would be willing to wager that they were all under New

1 York or Delaware law. Those cases failed not because there
2 were no merits, not because there was no standing, but because
3 they were improperly pled.

4 In closing, I ask that it be denied. I ask that
5 because they brought -- they did a substantial amount of
6 authority on the New York trust thing in the reply and I had
7 no upper hand, I asked for a short supplemental brief with no
8 argument so there is an equal amount of authority on the other
9 side of that issue --

10 THE COURT: Just on the New York trust issue --

11 MR. KEOGH: I would like -- I'm sorry, Your Honor.
12 I didn't mean to step on you.

13 THE COURT: As it is argued in their reply, is that
14 what you're saying?

15 MR. KEOGH: I would like to do the -- I would like
16 to do, yes, the authority on the other side of the issue. I
17 would also like to supplement -- I would also like to cite the
18 case holding -- supplement the case, and there's just one, I
19 believe, saying that doing an FHA loan and foreclosing on it
20 with the surviving spouse was illegal and citing the HAMP
21 regulation that says that denying a loan modification under
22 HAMP to a surviving spouse that is on the Note is exempt.

23 THE COURT: Wouldn't that be amending your
24 Complaint?

25 MR. KEOGH: No. It's already -- it's -- it's

1 already in there. It's just that -- it's just the thing that
2 it was already improper. I'm not putting forth a new claim;
3 I'm just supporting what's already in there.

4 THE COURT: I'll give you five extra pages to be
5 submitted within a week.

6 MR. KEOGH: Thank you.

7 Lastly, if I survive the motion, I would like -- I
8 would like leave to amend. And specifically that leave to
9 amend would be to add a count under Minnesota Statute 559 to
10 determine adverse claims, to remove the two Assignments of
11 record as being without legal force and effect, and add an
12 additional count for specific performance.

13 THE COURT: Thank you.

14 Mr. Schroeder, a brief response.

15 MR. SCHROEDER: Two things briefly, Your Honor.
16 First, on the issue of New York law, I would again just turn
17 the Court's attention to Magistrate Judge Mayeron's Report and
18 Recommendation in the *Wolff* action. That's one of the cases
19 that post-dated our briefing. It's the one I presented to
20 you, 2014 Westlaw 641510. Her discussion at *9, she concludes
21 that New York law does not void The Bank of New York Mellon's
22 trust in the mortgage. And in so doing, she has a relatively
23 lengthy citation to a number of cases. And the reason I
24 reference this again is just, as best I can tell, there's at
25 least four cases that Judge Mayeron cites that emanate out of

1 the New York State Courts, so I would encourage the Court to
2 take a look at that authority.

3 Second and final point is just sort of a brief
4 response to the last request from Mr. Keogh. I think we were
5 hearing about some potential issues that are not pled in his
6 Complaint, and I would ask the Court to disregard claims or
7 allegations that aren't presented. To the extent the
8 supplemental briefing that Mr. Keogh will be presenting to the
9 Court does get into issues like HAMP or FHA, I don't want to
10 overbrief anything, but I would request an opportunity to have
11 some right to respond to some new issue that hasn't been
12 before the Court to date.

13 THE COURT: Well, let me be clear. The five pages
14 are focused only on issues presented to the Court to date.
15 Very good. And Mr. Schroeder, after reading the five pages,
16 if you still think you need an opportunity for a reply, just
17 make the request.

18 MR. SCHROEDER: I will. I appreciate that. Thank
19 you, Judge.

20 THE COURT: Very good. You bet. This matter will
21 be taken under advisement. Court is adjourned.

22 **(WHEREUPON, the matter was adjourned.)**

23 (Concluding at 3:00 p.m.)

24
25 * * * *

CERTIFICATE

I, Heather A. Schuetz, certify that the foregoing is
a correct transcript from the record of the proceedings in the
above-entitled matter.

Certified by: s/ Heather A. Schuetz
Heather A. Schuetz, RMR, CRR, CCP
Official Court Reporter